

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 23, 2008 Session

STATE OF TENNESSEE v. GERRY HOOVER

**Direct Appeal from the Circuit Court for Coffee County
No. 33,125F John W. Rollins, Judge**

No. M2007-01595-CCA-R3-CD - Filed March 25, 2008

A Coffee County jury convicted the Defendant, Gerry Hoover, of three counts of rape of a child, and the trial court sentenced him to an effective sentence of forty-eight years in prison. On appeal, the Defendant raises three issues: (1) the trial court erred by allowing a psychologist to testify about the child victim's statements to her; (2) the evidence was insufficient to support his convictions; and (3) the sentence imposed was excessive. After a thorough review of the record and the applicable law, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

B. Campbell Smoot and Laura D. Riddle, Tullahoma, Tennessee, for the Appellant, Gerry Hoover.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Jennifer L. Smith, Associate Deputy Attorney General; Mickey Layne, District Attorney General; Jason M. Ponder, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

The Defendant was indicted on four counts of rape of a child. The following facts were presented at the Defendant's trial: B.H.,¹ a nine year old girl who lived with her two brothers, her sister, and her mother in Iowa stated that, when her family still lived in Tennessee, the Defendant, who was her stepfather, raped her several times. The first rape she testified about happened in 2003,

¹ For the privacy of the child victim, we will refer to her by her initials.

when her family went fishing at Normandy Lake. B.H. was seven years old. While the rest of her family fished at another part of the lake around dusk, she was alone with the Defendant, and “he started hurting [her] on [her] privates.” B.H. illustrated to the court where he touched her by touching the genital area on the doll she brought to trial. She said that after touching her for a few minutes, he climbed on top of her and “stuck his penis in [her].” B.H. said she did not know what his penis was when he did this. She said, “it felt weird, and [she] was really scared, and it hurt [her] feelings really bad[ly].” She explained that she did not yell “because [she] was scared.” B.H. said that later, when they were home, she heard the Defendant threaten, “if he wasn’t going to get any from [her] mom, he will find someone else,” but said she did not know what that meant.

B.H. then described a second rape to the jury. She said that one day, after school and after her mother left for the nightshift, the Defendant “stuck his tongue down by . . . [her] pee hole . . . and then he stuck his penis in [her].” She clarified that he “stuck his penis in [her] pee hole and in [her] poop hole.” B.H. said she did not tell anyone because “[she] was scared of what people might think of [her].” She said the Defendant also “stuck his tongue in [her] mouth.”

B.H. testified that the Defendant then raped her a third time, when she went to the store with him to get candy. She said he took her on a detour to Powers Bridge and “he started touching [her] on [her] privates.” She said “he touched [her] on [her] privates with [her] clothes on, and then he started pulling down [her] pants and stuff, and then he started touching [her] and sticking his penis in [her].” She said the Defendant then made her touch his penis with her hand. B.H. said that, when they left the bridge area, the Defendant began calling her mom and dad bad names, and when she told him not to, he “slapped [her] across the face.” B.H. said that after she got home, she told her mom what the Defendant had been doing to her. She was eight years old at this point.

On cross-examination, B.H. said that she now lives in Iowa with her siblings and mother. She said the Defendant would spank all the kids in the family. B.H. clarified that her biological father is the Defendant’s brother. B.H. said she did not initially tell her mom about the rapes because she was afraid. On redirect-examination, B.H. said “that night” of the Normandy lake incident, the Defendant “touched [her] with his hand in [her] privates with [her] pants down.” He also “stuck his tongue in [her] mouth and stuck his penis in [her].”

A.N., the thirteen year old sister of B.H., testified that she saw the Defendant laying on top of B.H. at Normandy Lake. A.N. said it was getting dark at the lake, and she had run out of worms, so she went to find the Defendant. She saw him on top of her sister, and she could not tell what they were doing, but could tell from her sister’s body positioning that the Defendant was hurting her. A.N. testified that she watched them for five to ten minutes, and then left the scene. She said she did not tell anyone about what she saw because the Defendant told her “to keep it a secret, and . . . if [she didn’t] keep it a secret, he [would] come after [her] and kill [her].” On cross-examination, A.N. stated she never heard B.H. scream or say anything while the Defendant was on top of her.

Dr. Maureen Sanger, a psychologist at Our Kids Center, testified about her evaluation of B.H. Dr. Sanger said the Center took a medical history of B.H., talked with her mom, talked with B.H.,

and performed a physical examination. When describing what B.H. told her, Dr. Sanger reported:

She told me that [the Defendant] had stuck his 'thing' . . . in both her genital area and her rectal area. She mentioned that that hurt when that happened, and I did ask her if she - if anything came out of her father's - stepfather's penis during that activity, and she said that wet stuff did and that she didn't like that, so she washed her bottom really good and took a bath when that occurred.

Dr. Sanger also testified that B.H. told her that the Defendant put a finger in her genital area and in her rectal area, he touched her chest, and he put his tongue on her genital area, on her rectal area, and in her mouth. Additionally, Dr. Sanger said B.H. revealed that the Defendant made her touch his penis and his testicles, and he made her put his hand in her "poo poo hole." Dr. Sanger testified that she did not treat B.H. with any type of counseling.

Nurse Hollye Gallion, a nurse practitioner at Our Kids Center, testified that the Center provides medical evaluations for kids that might have been abused. They test and treat the children for infections and physical wounds, similar to what an emergency room might do. Nurse Gallion said she performs the physical examinations of the children, and she performed such an examination on B.H. on July 3, 2003. She testified that B.H. "had not yet entered puberty, so her genital area was very much that of a small child," as opposed to that of an adult. During the examination, she saw a tear in B.H.'s hymen that had healed, which "would indicate injury to that part of her body." Nurse Gallion explained that it would take from a few days to two weeks for hymen tears to heal. B.H.'s anal exam was completely normal. Nurse Gallion said she could not tell how the hymen was torn, but it was consistent with the rapes B.H. described. On cross-examination, Nurse Gallion said there were no bruises and no abrasions on B.H.'s rectal area. She said they did not perform a rape kit because it had been too long since the alleged rape. On redirect-examination, Nurse Gallion further explained that a rape kit can only be used to gather evidence if it has been three or fewer days since the incident; in B.H.'s case, it had been between a week and two weeks. Additionally, she explained that a lot of little girls report being molested, but few retain physical signs of it. She also testified that touching the hymen of young pre-pubescent girls generally causes a lot of pain.

Investigator Dale Brissey, an investigator with the Coffee County Sheriff's Office, investigated this case and recommended that B.H. be examined at Our Kids Center. He said that when he was investigating the case and driving B.H. to the scenes of the alleged rapes, B.H. became very quiet and refused to eat afterwards, which was a marked change in her demeanor. Additionally, both B.H. and her sister separately led him to the same remote area at Normandy Lake to show him where the rape occurred.

The Defendant testified that he was employed as a janitor at Batesville, and he was married to B.H.'s mom for two to three years and had one child with her. He explained that before marrying him, B.H.'s mom was married to his brother, James Hoover, and she then became involved with his other brother, Terry Hoover. The Defendant admitted to smacking B.H., but explained that he did it because she called him a "son of a bitch." He also stated that when he slapped B.H., her mother

was not working and had not been working for awhile. The Defendant denied all sexual contact with B.H. and thought B.H. accused him as retaliation for the smack.

Marshall Bradford, one of the Defendant's neighbors and co-workers, testified that the Defendant "was a loving daddy" and a "go-getter" at work. Bradford continued espousing the Defendant's redeeming qualities, saying that he was known in the community as "a real good neighbor, a[n] honest neighbor, a helpful neighbor." On cross-examination, Bradford said he would have called the police if he saw the Defendant having sex with B.H.

Jimmy Albright, a friend of the Defendant, testified that the Defendant has an "outstanding" reputation in the community and is an honest man. The jury considered all of the evidence before it, and it convicted the Defendant of three counts of rape of a child.

B. Sentencing Hearing

At the sentencing hearing, Lily Powell, the Defendant's mother, testified that the Defendant was number eight of nine children. She said she never heard of any problems between the children in B.H.'s family and the Defendant. She stated that B.H.'s mother had difficulty keeping a job. Powell also said that when the Defendant was growing up, he was in special education classes.

Pauline Hoover, the Defendant's ex-wife, testified that she was married to him for seventeen years and had children with him. She said he was a hard worker.

Both B.H. and her mother submitted victim impact statements that the trial court considered when sentencing the Defendant. B.H. wrote that her stepfather began raping her when she was four years old. She recounted the various ways that he raped her, and she said he "threatened to kill [her] if [she] told [her] mom." B.H.'s mother wrote about the physical and emotional damage done to her daughter as a result of the Defendant's actions. She also discussed the effects of knowing about the abuse on her, and that they moved to Iowa to be safely away from the Defendant. After considering this evidence, the trial court sentenced the Defendant to an effective sentence of forty-eight years, and it is from these judgments that the Defendant now appeals.

II. Analysis

On appeal, the Defendant raises three issues: (1) the trial court erred by allowing a psychologist to testify about the child victim's statements to her; (2) the evidence was insufficient; and (3) the sentence imposed was excessive.

A. Hearsay Statements

The Defendant claims that the trial court erred when it allowed Dr. Sanger to testify about what B.H. told her during the examination. The Defendant claims this testimony was hearsay and does not come under any of the hearsay exceptions. The State argues that the statement was given

to a doctor with the expectation of medical treatment, so there is a sufficient indicia of reliability. Tenn. R. Evid. 803(4).

The testimony at issue is that of Dr. Sanger testifying about what B.H. told her when she examined B.H., such as identifying the Defendant as the perpetrator and describing how he raped B.H. The defense initially objected to the testimony, but the trial court allowed it on the rationale that the information was given for medical diagnosis and treatment, so it was a hearsay exception. The defense argued that there was no medical treatment at Our Kids Center, so the sufficient indicia of reliability were not present.

A trial court has broad discretion when determining the admissibility of evidence, and its ruling will not be reversed, absent an abuse of discretion. *State v. Campbell*, 904 S.W.2d 608, 616 (Tenn. Crim. App. 1995). Hearsay evidence consists of out of court statements offered for the truth of the matter they assert. Tenn. R. Evid. 801(c). There are concerns with reliability and the inability to cross-examine such statements, which is why they are excluded as admissible evidence. Tenn. R. Evid. 802. When the reliability of a statement can be verified, generally by the context of the statement, that statement may fall under a hearsay exception, and then be admissible in court. One of the acceptable exceptions to the rule against hearsay evidence is Tennessee Rule 803(4), which permits hearsay admitted as evidence in trial if the statement is made for the purpose of a medical diagnosis:

Statements made for [the] purposes of medical diagnosis and treatment describing medical history; pain or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The rationale behind this exception depends on the notion that people will be forthcoming to medical professionals to ensure proper and appropriate treatment and care. Neil P. Cohen, et al., *Tennessee Law of Evidence*, §8.09[3][b] (5th ed. 2005). In *State v. McLeod*, the Tennessee Supreme Court held that statements by a child pertaining to sexual abuse, whether it be the general character, cause, or source, is admissible as testimony from the person to whom the child told it, so long as there is a jury out hearing and an assurance that the child gave the statement for diagnosis and treatment. 937 S.W.2d 867, 870 (Tenn. 1996). The witness may also testify specifically to the perpetrator named by the child when the child sought treatment, so long as the identification was “reasonably pertinent to proper diagnosis and treatment of emotional and psychological injury.” *State v. Livingston*, 907 S.W.2d 392, 397 (Tenn. 1995). This burden of “reasonably pertinent” was deemed met when the perpetrator named lived in the child’s household. *State v. Hunter*, 926 S.W.2d 744, 747 (Tenn. Crim. App. 1995). When the trial court holds its jury out hearing to address the indicia of reliability of the child victim’s statement, it should analyze “the timing of the statement, the contents of the statement, whether the statement was made in response to suggestive or leading questions, whether the statement was improperly influenced by another, and any other circumstance that may undermine the state’s trustworthiness such as a custody battle or family feud.” *State v. Tucker*, No. M2005-00839-CCA-R3-CD, 2006 WL 547991, at *9 (Tenn. Crim. App., at Nashville, Mar. 7, 2006) (citing

McLeod, 937 S.W.2d at 870, *State v. Stinnett*, 958 S.W.2d 329, 332 (Tenn. 1997)), *no Tenn. R. App. P. 11 application filed*.

In this case, the trial court did not hold a jury-out hearing, but the Defendant did not object to the lack of a jury-out hearing. Generally, if there was no objection, the issue is waived on appeal. Tenn. R. App. P. 36(a). As such, in order to review this issue, it must be plain error, pursuant to Tennessee Rule 52(b) of Criminal Procedure. When we review for plain error, we look to see if: (1) the record clearly establishes what occurred in the trial court; (2) a clear and unequivocal rule of law was breached; (3) a substantial right of the defendant was adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000).

The record establishes that the trial court allowed testimony from Dr. Sanger relaying what B.H. told her while being medically evaluated, which satisfies element one. The trial court did not hold a jury-out hearing, as required by *McLeod*, therefore, the Defendant lost a right to argue the unreliability of the testimony to be offered, satisfying the second and third elements. While the Defendant objected to the testimony itself, the Defendant failed to object to the trial court's error in failing to hold the jury-out hearing. Given the first objection, it was unlikely that the failure to object was tactical, satisfying the fourth element. We not do conclude, though, that consideration of this error is necessary to do substantial justice, because a jury-out hearing likely would have had no effect on the trial court's finding.

Considering the *McLeod* and *Stinnett* factors, we conclude that the evidence was properly admitted. B.H. gave her statement to Dr. Sanger one to two weeks after having been raped for a third time. While that was not immediately after the rapes, B.H. repeatedly told the jury that she did not tell anyone about the rapes because she was afraid. Her story was also consistent with the length of time Nurse Gallion said a hymenal tear takes to heal. Nurse Gallion testified that B.H. had such a hymenal tear. Next, we conclude that Dr. Sanger did not ask any suggestive or leading questions. Dr. Sanger asked B.H. open-ended questions about her family, the times she had been to the hospital, and any recent problems she had with her body. Dr. Sanger asked B.H. questions that clarified her story. Dr. Sanger also testified that she did not treat B.H. for psychological abuse, but rather, helped Nurse Gallion gather the necessary information to determine what physical treatment, if any, was needed. Additionally, there is no evidence to show the statement was improperly influenced by another. What B.H. told Dr. Sanger during the examination matched her testimony at trial and her sister's testimony concerning one of the rapes. Finally, there were no extenuating circumstances that would reduce the reliability of B.H.'s statements. While the Defendant attempted to show that B.H. was accusing him because he slapped her, B.H. spoke with Dr. Sanger one to two weeks after that incident, lessening the likelihood of a vengeful accusation. We also note that B.H. knew she was at Our Kids Center for a medical evaluation. We conclude that under the *McLeod* and *Stinnett* factors, B.H.'s statements to Dr. Sanger had a sufficient indicia of reliability to admit them as evidence. Since the statements would have been admitted had the trial court held a jury-out hearing, the trial court did not commit plain error, and the Defendant is not entitled to relief on this issue.

B. Sufficiency of the Evidence

The Defendant claims there was insufficient evidence to support the three convictions for rape of a child. The State argues that the testimony of the victim, the eyewitness, and the medical experts sufficiently support the convictions.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); see Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

The Defendant was convicted of three counts of rape of a child. Rape of a child is defined as "the unlawful sexual penetration of a victim by the defendant . . . if the victim is less than

thirteen (13) years of age.” T.C.A. § 39-13-522 (2003). “Sexual penetration” means “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of the victim’s . . . body.” T.C.A. § 39-15-501(7) (2003).

The facts in this case support all three counts of rape of a child. Supporting the first count of rape of a child, B.H. described in detail how the Defendant “stuck his penis in [her].” Additionally, A.N. testified that she saw the Defendant raping her sister. Also, both B.H. and A.N. led the police to the same remote location at Normandy Lake where the Defendant raped B.H. Supporting the second count of rape of a child, B.H. testified the Defendant penetrated her vagina and rectum with his penis. In support of the third count of rape of a child, B.H. testified that the Defendant again penetrated her vagina with his penis. Moreover, there was physical evidence gathered by Nurse Gallion of a hymenal tear, consistent with a vaginal rape. Furthermore, in support of all three counts of rape, B.H.’s testimony was consistent with what she told Dr. Sanger during her medical examination. The Defendant is not entitled to relief on this issue.

C. Sentencing

The Defendant lastly raises a claim that his sentence is excessive. When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm’n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant’s potential or lack of potential for rehabilitation or treatment. See T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

The Defendant signed a waiver, allowing the trial court to sentence him under the Sentencing Reform Act of 2005. The trial court sentenced the Defendant to twenty-four year sentences for each

of the three convictions, with two to be served concurrently, but consecutively with the third. In its order, the trial court notes that rape of a child is a class A felony. T.C.A. § 39-13-522 (2003). The trial court found that the combination of the relationship between B.H. and the Defendant, the nature and scope of the acts, the extent of mental and physical damage to B.H., and the length of time B.H. endured these acts justified consecutive sentences, citing Tennessee Code Annotated section 40-35-115(b) (2003). For enhancement factors, the trial court found four that applied in this case:

The crimes for . . . which the defendant now stands convicted occurred when [B.H.] was seven (7) and eight (8) years old. The court accepts the state's enhancing factor that the defendant had a previous history of criminal behavior in addition to those necessary to establish the appropriate range. Further the court finds that this victim was particularly vulnerable because of her age and the mental abuse heaped on her by the defendant who continually threatened her if she reported these sexual acts. It is further the opinion of the court that this defendant committed these acts to gratify his sexual desire for pleasure or excitement as indicated in the victim's impact statement by saying "if he couldn't get anything from mommy he would get someone else." This victim had a slightly older sister who witnessed at least one of the sexual acts and could not resolve whether he was referring to her or her sister. Finally, this defendant abused his position of private trust to facilitate the commission of this offense. As a step-father he was under a duty to protect this victim and he clearly violated that duty by his actions behind closed doors in a residence and in an isolated area not readily available to the public.

The trial court was not persuaded to apply any mitigating factors.

On review, we conclude the trial court did not err when sentencing the Defendant. According to the Tennessee Code Annotated, the trial court "shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence," with many specific factors listed. T.C.A. § 40-35-114 (2003). Enhancement factor (1) is a previous history of criminal convictions or criminal behavior. According to the pre-sentence report, the Defendant has prior misdemeanor convictions, proving a history of criminal convictions. Also, in her victim impact statement, B.H. accused him of beginning to molest her when she was four years old, showing the Defendant has a history of criminal behavior. Enhancement factor (4) advises enhancement if the victim was particularly vulnerable because of age. We recognize the Defendant's argument that the court must rely on a fact other than the victim's age to find this enhancement factor because age is an element of the offense. *See State v. Walton*, 958 S.W.2d 724, 729 (Tenn. 1997) (citing *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997)). Given that the victim was seven years old and that the Defendant was a father-figure to her, she believed his threats that he would kill her if she told someone about his raping her. That is sufficient vulnerability. We also conclude that enhancement factor (7), the Defendant committed the offense to gratify the defendant's desire for pleasure or excitement, applies. The Defendant repeatedly raped B.H. and made her actively participate by placing her hands on his body and having her place his hands on her body. Additionally, he told her that if he could not "get it" from her mother, then "he [would] find somebody else." We also

conclude the trial court properly applied enhancement factor (14), that the Defendant abused his position of trust. The Defendant was B.H.'s uncle and then her step-father; he lived with her and her family in their house. Through his actions, the Defendant took advantage of this position. The trial court did not find any applicable mitigating factors, and we agree.

We also conclude that the trial court was within its authority to sentence the Defendant to consecutive sentences. Under Tennessee Code Annotated 40-35-115(b)(5), the trial court may sentence the defendant consecutively if:

The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim . . . , the time span of the defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim.

(2003). The Defendant was convicted of three counts of rape of a child. The Defendant was B.H.'s uncle, and then he became her step-father. B.H. said in her victim impact statement that the Defendant had been raping her since she was four years old, and this activity went unreported until she was eight years old. The "nature and scope" of the acts often included penile and digital penetration into the victim's vagina and rectum. According to her mother's victim impact statement, as a result of the extended abuse, B.H. has suffered substantial harm both physically and mentally. The facts in this case support the trial court's finding of the statutory aggravating circumstances.

Furthermore, we disagree with the Defendant's contentions that he would benefit from an earlier release because his "potential for rehabilitation is exceptional" and the public does not need additional protection. The Defendant began raping B.H. when she was four years old. He raped her for at least four years, all the while threatening her with her life to keep her quiet. He expressed the need to "get it" from "somebody," and he chose to fulfill that need by raping his step-daughter. The trial court was within its right to order that two of the three sentences be served consecutively. *See* T.C.A. § 40-35-115 (2003). The trial court properly sentenced the Defendant, and the Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the evidence and applicable law, we conclude that the trial court did not err by admitting hearsay evidence, the evidence sufficiently supports the verdict, and the trial court appropriately sentenced the Defendant. We affirm the judgments of the trial court.

ROBERT W. WEDEMEYER, JUDGE